LIBRARY
SUPREME COURT, U. S.

FILED
JAN 20 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

No. 959

DAVID RAY CROWLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT G. CABELL, JR., P.D.
721 East Main Street
Richmond, Virginia 23219
Counsel for Petitioner

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT 4

ARGUMENT

I. Petitioner Was Denied Due Process Of Law In That The Order To Report For Civilian Work Upon Which The Indictment Of Petitioner Was Based Is Void, Because It Was Signed By A Clerk Of The Local Board. 5

II. Petitioner Was Denied Due Process Of Law In That The Order To Report For Civilian Employment Failed To Comply With The 32 C.F.R. Section 1660.20(d). 9

CONCLUSION 11

CERTIFICATE 11

APPENDIX

TABLE OF CITATIONS

Constitution of the United States, Amendment V 2

28 U.S.C.A., Section 1254(1) 2

32 C.F.R., Section 1660.20(d) (1967) 3, 5

50 United States Code Annotated Section App. 456(j) 3

Brede v. United States, 396 F. 2d 155 (9 Cir. 1968) 5, 7, 8, 10

32 C.F.R., Section 1604.59 7

Supreme Court of the United States

No. .....

DAVID RAY CROWLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The defendant, David Ray Crowley, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

David Ray Crowley was indicted in the United States District Court for the Eastern District of Virginia at Richmond, Virginia, during the October 1967 term for the violation of Title 50, U.S.C.A., Sections 456(j) and 462(a). The trial of the defendant commenced on December 4, 1967, before the Honorable Robert R. Merhige, Jr., Judge, without intervention of a jury. The defendant pleaded not guilty and after the matter had been continued several

times during the course of the trial was concluded on March 15, 1968, at which time the defendant was found guilty and sentenced to a term of four and one-half years. From the judgment of conviction, the petitioner appealed to the United States Court of Appeals for the Fourth Circuit. The opinion and judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 19, 1968, upholding the decision of the United States District Court for the Eastern District of Virginia. Said opinion is appended hereto (App. 5).

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1968. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254(1).

QUESTIONS PRESENTED

I. Whether petitioner was denied due process of law in that the order to report for civilian work upon which the indictment of petitioner was based is void because it was signed by a clerk of the local board?

II. Whether petitioner was denied due process of law in that the order to report for civilian employment failed to comply with 32 C.F.R., Section 1660.20(d)?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor

shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

32 C.F.R., Section 1660.20(d) (1967):

If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon the type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in Section 1660.1 which it deems appropriate, but such order shall not be issued prior to the time the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

50 United States Code Annotated Section App. 456(j):

Nothing contained in this title (sections 451-454 and 455-471 of this Appendix) shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, (sections 451-454 and 455-471 of this Appendix), be assigned to noncombatant service as

defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) (section 454(b) of this Appendix) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board pursuant to Presidential regulations may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title (section 462 of this Appendix), to have knowingly failed or neglected to perform a duty required of him under this title (sections 451-454 and 455-471 of this Appendix).

STATEMENT

David Ray Crowley is a registrant of Local Board No. 115, Spotsylvania County, Virginia. Defendant filed his classification questionnaire with the draft board indicating his claim to a ministerial exemption. This claim was corroborated by letters from other members of his religious organization. Pursuant to this the local board considered his classification on October 5, 1966, and classified him in I-0, which is the classification for a registrant who is opposed to both combatant and noncombatant service, and who would, with the I-0 classification serve in a civilian capacity. Defendant did not appeal this classification at that time, nor did he request a personal appearance with the board. On October 25, 1966, registrant was ordered to take his armed forces physical examination. He was found to be acceptable, and thereafter, the local board processed him for assignment to civilian work. In December of 1966, the draft board mailed the defendant a letter with a form attached

to be filled out regarding his preference to civilian assignment in lieu of induction. The defendant returned this without making any entries thereon, along with the letter saying he could not accept a job from the government. Again in March of 1967, the defendant was furnished with a list of three jobs, one of which he could accept that would be appropriate. Again, the defendant refused work. Thereupon, on April 21, 1967, the local board decided that registrant should be offered employment with the Virginia Department of Highways in Ashland, Virginia. The local board then wrote the State Director's Office for authorization from National Headquarters for the local board to order the registrant to report for civilian work. National Headquarters authorized the local board, and on May 19, 1967, an order to reoprt for civilian work was mailed to David Ray Crowley, said order being signed by a clerk of the local board. The defendant did not report as ordered and was subsequently indicted, tried and convicted.

ARGUMENT

I

Petitioner Was Denied Due Process Of Law In That The Order To Report For Civilian Work Upon Which The Indictment Of Petitioner Was Based Is Void, Because It Was Signed By A Clerk Of The Local Board.

The determination at this point must be considered in light of the recent decision of *Brede* v. *United States,* 396 F.2d. 155 (9 Cir. 1968). This case involved a similar point of law in that the registrant, after being found to be otherwise acceptable, was classified I-0 and processing towards a civilian work assignment in lieu of induction was commenced, pursuant to 32 C.F.R., Section 1660.20. As in the instant case, a meeting was held between registrant and the

board as to the type of work in lieu of induction and no agreement was reached between the parties. The board did determine that work as an institutional helper was appropriate for registrant and that such work was available. Thereafter, the clerk of the draft board requested the Director of Selective Service for authority to order appellant to perform the work. Subsequent to such authority being received, an order to report for civilian work (Selective Service Form No. 153) was sent to registrant by a person who signed as clerk of the board. In reversing the conviction of the lower court, the Ninth Circuit held:

> It clearly appears from the record and we conclude that there was not an order issued or authorized by the board requiring the appellant to report to the local board for instructions to proceed to a place of employment. The local board did not comply with section 1660.20(d), supra, after receiving the authority to order the appellant to report for civilian work. This section requires the local board, after receiving such authorization, to meet and order the appellant to report for such civilian work. The appellant's Selective Service file shows that no meeting was held concerning the appellant subsequent to March 14, 1966. Neither the official clerk nor Barbara Jones, the person who signed the purported order, had or was given the authority by the board to order the appellant to report for civilian work in lieu of induction. It is not provided in the Selective Service Regulations that a clerk can order a I-0 registrant to report for civilian work without a meeting and the approval of the board members. In this case the board had not met after March 14, 1966, and had not given the clerk of the board, or anyone else, the authority to issue an order.
>
> This is not a case of a procedural error wherein there was no prejudice to the appellant. Here there was a failure on the part of the local board to issue or author-

> ize the issuance of an order to report for civilian work in lieu of induction. Obviously the purported order signed by Barbara Jones was not an order of the board or one authorized by it. There was no substantial compliance with section 1660.20(d), supra.

The footnote numbered 2 to the *Brede* decision reads as follows:

> [2] The April 22nd order was signed by Barbara Jones as clerk of the local board. At said time Barbara Jones was working for the local board she was not the clerk of the board and did not become clerk until September 19, 1966. We do not consider the effect, if any, of her signing the purported order because of our holding that no order was issued or authorized to be issued by the board.

Petitioner with respect to this particular point of law acknowledges the fact that the *Brede* decision did not rule on the effect, if any, of the order to report for civilian work being signed by a clerk of the board as opposed to a member of the board. As pointed out in the court below herein, Regulation 32 C.F.R. Section 1604.59 provides that "official papers issued by a local board may be signed by the clerk of the local board if he is authorized to do so by resolution duly adopted and entered in the minutes of the local board." In the case at Bar the order to report for civilian work was signed by a clerk for the local board. The Selective Service file contained no resolution adopted by the local board authorizing the clerk to enter said order. Pursuant to the request of the court below, the United States Attorney secured a statement from the clerk having signed the order in question, which was made a part of the record in this proceeding, which states as follows:

I have checked all Local Board # 115, Spotsylvania County, Va. minutes from 1948 to the present time and cannot locate a resolution in print that would give me authority to sign all official papers.

I have been clerk and executive secretary for Local Board # 115, Spotsylvania County, Va. and Local Board # 116, Fredericksburg City, Va. (in the same office) since August 1948. The resolution giving me authority to sign all official papers for Local Board No. 116 was recorded on minutes of March 2, 1960, and I feel very confident that this matter was brought before Local Board No. 115, Spotsylvania County, about the same time, and for some reason of oversight was not recorded on the minutes.

Very truly yours,

Virginia S. Nessenthaler, Exec. Sec.
LB # 115 & 116, Va.

This is a clear and unequivocal statement by the clerk signing the order in question that there was no duly adopted resolution entered in the minutes of the local board giving her authority to sign official papers of the board.

This matter was not decided by the *Brede* decision, but merely pointed out by the court as an issue. Petitioner is unable to find any case directly in point thereon. The lower court hinged its rejection of this argument on the fact that that court had held previously that a presumption of regularity attaches to the official proceedings and acts and that all necessary prerequisites to the validity of an official action are presumed and to have been complied with and where the contrary is asserted it must be affirmatively shown. It is respectfully urged that this places an impossible burden on the defendant in a criminal proceeding. Certainly it must not be forgotten that this is a criminal case and that the

burden of proving the defendant guilty beyond all reasonable doubt at no time lessens or shifts to the defendant. How can the defendant go forward to prove that no authorization was ever given to the clerk when in fact none ever was. We have the Selective Service file of the defendant, which, by the testimony of the party introducing it into evidence, Major Corman, contains the full and complete record of all official actions of the board with respect to defendant. Furthermore, we have the statement in the record by the clerk, herself, that no resolution was ever recorded in the minutes of this particular board authorizing her to sign the official orders of the board. It is acknowledged that the draft boards have a tremendous amount of paper work and red tape with which to deal. Be that as it may, this can in no way alter or affect the requirement for procedural and substantive regularity in processing the defendant for induction. If in fact an order is sent out which was not authorized or signed by the issuing body, then how can such order ever be the basis for a criminal prosecution. It is submitted that said order is totally void *ab initio* and that the indictment thereon must fall. If, however, this court should feel that the signature by the clerk to the order is directory rather than mandatory. it is urged that argument on this point be considered with that of the subsequent point argued here below.

II

Petitioner Was Denied Due Process Of Law In That The Order To Report For Civilian Employment Failed To Comply With The 32 C.F.R., Section 1660.20(d).

Petitioner's argument specifically is that the board which determined his assignment to civilian work and submitted its action to the Director of Selective Service for his approval should thereafter have held another meeting to consider

his case again prior to the issuance of an order to report for civilian employment. On this basis also it is contended that the issuance of an order to report was never properly authorized and that it necessitates reversal of the conviction.

Unquestionably, the regulation makes approval of the director essential to a board's ordering a conscientious objector to report for civilian work. Further, the regulation requires that the director's approval be obtained before the local board may authorize issuance of the order. The lower court in this case held that an order to report for civilian work may be authorized conditionally, to become effective on the director's approval. In the *Brede* case, *supra,* the court modified its opinion, said subsequent opinion having been filed September 10, 1968, a copy of which is made a part of the record herein:

> The United States contends that under Universal Administration Construction of Section 1660.20(d) and Universal Administrative Practice, a determination that certain work is appropriate constitutes an implied order to report for such work, subject to authorization of the National Director and notice.
>
> Consequently, at the meeting of March 14, 1966, an agreement as to work was reached and an implied conditional order to report was entered and the action of the clerk of the board was no more than an implementation of the order.
>
> The Government's contention may have merit in an appropriate case. Here, however, the record is silent as to administrative construction and practice or as to any understanding of the board in such respects from which it might be found that the critical exercise of administrative judgment had been made.

It is submitted that as in the *Brede* case the record in this proceeding is likewise silent as to administrative construction

and practice or as to any understanding of the board from which it might be found that the critical exercise of administrative judgment had been made. The record in the instant case very closely parallels that of the *Brede* decision, and it is submitted that this court should rule in accordance with the *Brede* decision that the order to report for civilian employment was never officially entered.

CONCLUSION

For the reasons stated it is hereby respectfully submitted that a Writ of Certiorari be issued to review judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

DAVID RAY CROWLEY

By ROBERT G. CABELL, JR.
Counsel

ROBERT G. CABELL, JR., P.D.
721 East Main Street
Richmond, Virginia 23219
Counsel for Petitioner

CERTIFICATE

I hereby certify that a true and complete copy of the foregoing Petition for a Writ of Certiorari was mailed to the United States Attorney, Eastern District of Virginia, Post Office Building, Richmond, Virginia, and to the Solicitor General of the United States, Department of Justice, Washington, D.C., on the 20th day of January, 1969.

ROBERT G. CABELL, JR.

STATE OF VIRGINIA,
CITY OF RICHMOND, } to-wit:

This day personally appeared ROBERT G. CABELL, JR., before me, a Notary Public in and for the City and State aforesaid, and after being duly sworn made oath that the statements set forth in the foregoing Certificate are true.

Given under my hand this 14th day of January, 1969.

My commission expires: 2/13/72

/s/ BEVERLEY B. SALMON
Notary Public

APPENDIX I

Documents From The Appellant's Selective Service File

(Government Exhibit No. 1) Page Nos. 21 and 5

LOCAL BOARD NO. 115
Spotsylvania County
Room 1, Post Office Building
Fredericksburg, Va. 22401

March 22, 1967

David Ray Crowley, SS No. 44-115-46-151
2504 Tidewater Trail
Fredericksburg, Va. 22401

Dear Sir:

This local board has been notified that the types of work shown below are available for you to perform with the agencies listed, in lieu of induction:

Highway work with the Virginia Department of Highways, Ashland, Virginia

Hospital work at Eastern State Hospital, Williamsburg, Virginia

Institutional work with Eastern State Hospital, Williamsburg, Virginia

This local board has made a determination that any of these three types of work are appropriate for you to perform.

It is requested that you notify this local board within ten (10) days if you will accept any one of the three types of work listed above. A self-addressed envelope which requires no postage is enclosed for your convenience.

If you do not accept any of the types of work listed above or if you do not obtain some type of work with an approved agency you will be assigned to some type of work by this local board which it feels is appropriate.

By direction of the Local Board:

/s/ Virginia S. Nessenthaler
Clerk

Selective Service System

ORDER TO REPORT FOR CIVILIAN WORK
AND STATEMENT OF EMPLOYER

LOCAL BOARD NO. 115
Spotsylvania County
Room 1, Post Office Building
Fredericksburg, Va. 22401

May 19, 1967

To David Ray Crowley 44-115-46-151

Mailing address: 2504 Tidewater Trail, Fredericksburg, Va. 22401

Having been found to be acceptable for civilian work contributing to the maintenance of the national health, safety, or interest you have been assigned to highway work located at Virginia Department of Highways, Ashland, Va.

You are ordered to report to the local board named above at 6:20 A.M. on the 5 day of June, 1967, where you will be given instructions to proceed to the place of employment.

You are ordered to report for employment pursuant to the instructions of the local board, to remain in employment for twenty-four (24) consecutive months or until such time as you are released or transferred by proper authority.

You will be instructed as to your duties at the place of employment.

Failure to report at the hour and on the day named in this order, or to proceed to the place of employment pursuant to instructions, or to remain in this employment the specified time will constitute a violation of the Universal Military Training and Service Act, as amended, which is punishable by fine or imprisonment or both.

/s/ Virginia S. Nessenthaler
(Clerk of the Local Board)

STATEMENT OF EMPLOYER

The registrant identified above reported for civilian work on the ..... day of ....., 19...., to Name of Employer ..... Address of Employer .....

.....

.....

APPENDIX II

Government's Exhibit Filed In Court Below

SELECTIVE SERVICE SYSTEM
LOCAL BOARD NO. 115
Spotsylvania County
Room 1, Post Office Building
Fredericksburg, Va. 22401

October 31, 1968

The State Director of Selective Service
400 N. 8th Street
Richmond, Va. 23240

SUBJECT: Authorization for signing official papers.

Dear Sir:

I have checked all Local Board # 115, Spotsylvania County, Va. minutes from 1948 to the present time and cannot locate a resolution in print that would give me authority to sign all official papers.

I have been clerk and executive secretary for Local Board # 115, Spotsylvania County, Va. and Local Board # 116, Fredericksburg City, Va. (in the same office) since August 1948. The resolution giving me authority to sign all official papers for Local Board No. 116 was recorded on minutes of March 2, 1960, and I feel very confident that this matter was brought before Local Board No. 115, Spotsylvania County, about the same time, and for some reason of oversight was not recorded on the minutes.

Very truly yours,

Virginia S. Nessenthaler, Exec. Sec.
LB # 115 & 116, Va.

APPENDIX III

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12,281.

United States of America,
Appellee,

versus

David Ray Crowley,
Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Robert R. Merhige, Jr., District Judge.

(Argued October 29, 1968 Decided December 19, 1968.)

Before SOBELOFF, BRYAN and WINTER, Circuit Judges.

Robert G. Cabell, Jr. (White, Roberts, Cabell & Paris on brief) for Appellant, and Michael Morchower, Assistant United States Attorney, (C. V. Spratley, Jr., United States Attorney, on brief) for Appellee.

SOBELOFF, Circuit Judge:

This is a Selective Service appeal by a member of the Jehovah's Witnesses.

On October 5, 1966, the local draft board classified appellant David Ray Crowley as a conscientious objector. He did not appeal this classification, nor did he request a personal appearance before the board. After the required physical examination, in which he was found acceptable, the board advised him that he would be directed to report for civilian work in lieu of induction into the armed forces. A form was sent to him upon which he was requested to indicate the type of civilian work he was qualified to do. He returned the form blank, along with a letter expressing his intention to refuse any type of civilian work because of his beliefs. In March, 1967, a list of three types of available work was furnished Crowley and he was asked to make a choice, and again he refused to accept any type of civilian work.

Shortly thereafter, on April 21, 1967, the local board and a representative of the State Director of Selective Service met with appellant, in compliance with 32 C.F.R. § 1660.20 (c)[1] for the purpose of attempting to reach an agreement as to the type of civilian work he would perform. At this meeting appellant once more declared that he would decline any kind of civilian work. After Crowley left the meeting, the local board selected highway work with the Virginia Department of Highways as appropriate civilian work for him, and the Director of Selective Service later approved this selection.

On May 19, 1967, an order was mailed to the appellant requiring him to report on June 5, 1967, to his local board,

---

[1] 32 C.F.R. § 1660.20(c) provides:

(c) If the local board and the registrant are unable to agree upon a type of civilian work which should be performed in lieu of induction, the State Director of Selective Service for the State in which the local board is located, or the representative of such State Director, appointed by him for the purpose, shall meet with the local board and the registrant and offer his assistance in reaching an agreement.

which would then direct him to his assignment at the Virginia Department of Highways. His failure to appear on that date is the basis of the prosecution for violating the Universal Military Training and Service Act, 50 U.S.C.A. §§ 456(j) and 462(a). This appeal is from the judgment entered against him by the District Court after a non-jury verdict of guilty.

I

The appellant maintains that the conviction should not be permitted to stand because his classification as a conscientious objector was improper. His counsel earnestly submits that the board failed to consider his claim to a ministerial exemption. In support of this contention, he points out only that there is no specific notation in his Selective Service file that this claim was considered, and from this he deduces that the local board failed to consider it.

We think the attack on the classification cannot prevail. It is not disputed that Crowley's letter in support of his dual claims for a ministerial exemption and conscientious objector status was placed in his file, and it must be assumed that the local board considered the entire document and both of the registrant's claims when it classified him. *Skinner* v. *United States,* 215 F.2d 767 (9 Cir. 1954), *cert. denied,* 348 U.S. 981 (1955). In the circumstances, the board's grant of the one negatived the other.

In any event, Crowley failed to pursue administrative remedies, and is therefore precluded from obtaining judicial review of his classification.[2] The requirement of administra-

[2] United States v. Grundy, 398 F. 2d 744 (3 Cir. 1968); Mahan v. United States, 396 F. 2d 316 (10 Cir. 1968); Campbell v. United States, 396 F. 2d 1 (5 Cir. 1968); United States v. McKart, 395 F. 2d 906 (6 Cir. 1968); Dunn v. United States, 383 F. 2d 357 (1 Cir. 1967).

tive exhaustion is relaxed only in exceptional and unusual circumstances. *Thompson* v. *United States,* 380 F.2d 86 (10 Cir. 1967). No such circumstances are suggested here. At no time have any facts been brought to the attention of the board or the court to justify his failure to seek relief through established administrative channels. When the registrant failed to appear or appeal, the board's classification became final and is not now open to review.

II

We turn next to Crowley's contention that the order to report for civilian work is void because it was signed by a clerk of the local board who was not shown to have been properly authorized to sign official documents. He reasons that the order is therefore a nullity and failure to obey it may not be made the basis of a criminal prosecution.

Regulation 32 C.F.R. § 1604.59 provides that "official papers issued by a local board may be signed by the clerk of the local board if he is authorized to do so by resolution duly adopted and entered in the minutes of the local board." Appellant assumed in arguing the appeal, though apparently the point was not made in the District Court, that it was incumbent on the Government to produce the required resolution and minute books, and that by failing to do so it conceded that the clerk was unauthorized to sign the order. We disagree with the assumption and hold that the burden was on the appellant to make at least some showing in the trial court that the clerk was unauthorized to sign the order. We adhere to the view expressed by this court in an earlier Selective Service case, *Koch* v. *United States,* 150 F.2d 762, 763 (4 Cir. 1945), where the general rule was stated:

> A presumption of regularity attaches to official proceedings and acts; it is a well settled rule that all

> necessary prerequisites to the validity of official action are presumed to have been complied with, *and where the contrary is asserted it must be affirmatively shown.* (Emphasis added.)

The absence of any showing of this character by the appellant at trial is sufficient to dispose of the contention. Even if it were assumed that no resolution was adopted in strict compliance wih § 1604.59, the appellant's contention would still be lacking in cogency. Courts have repeatedly held that a Selective Service board's action should not be invalidated because a clerk has signed a document without receiving authorization in the manner prescribed by the regulations. Relief has been denied on the theory that the registrant has suffered no prejudice in these situations. See, *e.g.*, *United States* v. *Lawson*, 337 F.2d 800 (3 Cir. 1964), *cert. denied*, 380 U.S. 919 (1965) where the requirement of a resolution authorizing the clerk to sign official papers was said to be directory and not mandatory and the absence of a resolution did not excuse compliance with an otherwise valid board order. To the same effect is *Talcott* v. *Reed*, 217 F.2d 360 (9 Cir. 1955). In *Smith* v. *United States*, 157 F.2d 176 (4 Cir.), *cert. denied*, 329 U.S. 776 (1946), Judge Soper, for this court, ruled that the board's order would not be nullified where a resolution had been adopted but had not been entered in the minutes. He pointed out that "the defendant was in no way injured by the board's disregard of a directory administrative detail in the performance of its duties." 157 F. 2d at 182. See also *United States* v. *Fratrick*, 140 F.2d 5 (7 Cir. 1944).

III

Another ground on which the validity of the board's order is challenged is that the local board failed to comply with

32 C.F.R. § 1660.20(d).[3] The irregularity is said to be that the board which determined the registrant's assignment to civilian work and submitted its action to the Director of Selective Service for his approval should thereafter have held another meeting to consider the registrant's case again. The argument propounded is that the omission of a further meeting after the Director had given his approval to the proposed assignment constituted an imperishable deviation from the directive of the regulation. On this basis it is contended that the issuance of an order to report was never properly authorized and that this necessitates reversal of the conviction.

Unquestionably the regulation makes approval of the Director essential to a board's ordering a conscientious objector to report for civilian work. However, the appellant reads into the regulation a requirement that the Director's approval be obtained *before* the local board may authorize issuance of the order. In other words, the appellant's argument is that the board may not authorize issuance of an order contingent on the Director's subsequent approval.

Appellant calls our attention to *Brede* v. *United States*, 396 F.2d 155 (9 Cir. 1968), a recent case in which the Ninth Circuit reversed a registrant's conviction of failing to comply with a local board's order to report for civilian work on the ground that there had not been substantial compliance with § 1660.20(d). There, a registrant who had been classified as a conscientious objector met with his local board on March 24, 1966, to discuss possible civilian employment.

---

[3] 32 C.F.R. § 1660.20(d) provides:

(d) If after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work * * *

No agreement was reached. The Director's approval for the assignment of Brede to civilian work was then sought and obtained. The local board did not meet after receiving the Director's authorization but issued an order to the registrant to report for civilian work. The criminal prosecution was predicated upon his refusal to comply with that order.

Construing and applying § 1660.20(d), the Ninth Circuit reversed the conviction, initially resting its decision on the local board's failure to meet after receipt of the Director's approval, for the purpose of formally authorizing issuance of an order to report for civilian work. The Government, concerned over the court's holding that a local board must meet again after receipt of the Director's authorization, petitioned for a rehearing. On further consideration, the court clarified the basis of its decision and modified its holding in the following terms:

> The United States contends that § 1660.20(d) does not require that a meeting be held after receipt of authorization; that an order to report could be entered prior to authorization but subject to subsequent authorization and notice.
>
> *We agree.* (Emphasis added.)

The court then ordered deletion of the language in its reported decision which indicated a necessity for a meeting subsequent to the Director's approval.

It is therefore plain that since its modification the *Brede* opinion no longer supports the contention of the appellant in this case. We agree with the opinion as deliberately revised by the Ninth Circuit, that an order to report for civilian work may be authorized conditionally, to become effective on the Director's approval.

IV

Inasmuch as our appellant puts general reliance on the *Brede* decision, it is perhaps in order to advert to another matter, not directly raised by him. This relates to the point that the Ninth Circuit preserved as the sole reason for denying the petition for rehearing and adhering to its reversal of the conviction.

There, the appellant contended that at the meeting held by the board it arrived at no final decision, and hence there could be no lawful order of the board directing him to appear for civilian work. The Government's answer was that "a determination that certain work is appropriate constitutes an implied order to report for such work, subject to authorization of the National Director and notice." In this view, the Government's submission was that the clerk's action after receipt of the Director's approval was no more than ministerial implementation of the order.

What is significant for us is the court's acknowledgment that this contention might have merit in an appropriate case, although it found no evidence in the record before it that the board's action before receiving the Director's approval was understood by the board to be a critical exercise of its administrative judgment. That the court's decision was based precisely on a failure of proof is emphasized by its statement that "our opinion should be read as qualified by the state of the record."

The record before us does not suffer from the *Brede* defect. Crowley's file contains a memorandum of the board's meeting with him on April 21, 1967. This document, prepared by the board's clerk, reads in part as follows:

> The local board decided that registrant should be offered employment with Virginia Department of Highways, Ashland, Virginia, doing highway work.

We are persuaded that Crowley's board, unlike Brede's, indeed intended to exercise its administrative judgment on that date, subject to the Director's approval. When the Director's approval was given, it was not necessary for the board to hold another meeting with respect to the matter.

The religious integrity of the appellant excites admiration; but, while the law of the land yields to a conscientious objector's scruples against military service, it does not immunize him from useful civilian work. The validity of the Act and the regulations is not contested; only the procedure is in issue. Our conclusion is that there has been full compliance with the regulations and the the trial was free from error.

The judgment of the District Court is

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 959

DAVID RAY CROWLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 5-13) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1968. The petition for a writ of certiorari was not filed until January 20, 1969, and is

therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a local Selective Service board lacks the power to issue a valid order to report for civilian work unless, after receiving the National Director's authorization of the particular employment proposed, the board reconvenes prior to the issuance of the order, even though the local board has, at a prior meeting, concluded that the work is suitable for the registrant and decided to offer him that position, subject to the National Director's authorization.

2. Whether the order to report for civilian work in this case was void, because it was signed by the clerk of the board in the absence of an entry in board's minutes formally authorizing her to do so.

STATEMENT

Indicted in the United States District Court for the Eastern District of Virginia for failure to obey an order to report for civilian work, in violation of 50 U.S.C. 456(j) and 462(a), petitioner waived jury trial, and was tried and convicted by the court. On March 15, 1968, he was sentenced to four and one-half years' imprisonment. The court of appeals affirmed (Pet. App. 5-13).

Petitioner, a Jehovah's Witness, timely registered with his local Selective Service board and sought clas-

sification as a conscientious objector (II R. 5-6).[1] Since petitioner was still in high school, however, he was initially classified I-S-H. Following graduation, petitioner received, on October 5, 1966, a notice that he had been classified I-O (II R. 6-7). Classifying petitioner as a conscientious objector implicitly rejected his intervening application for a ministerial exemption (IV-D); this determination was apparently based on the conclusion that "pioneering" for the Witnesses did not fall within the statutory exemption envisioned by Congress (II R. 7). Petitioner took no appeal from his classification (II R. 8).

After petitioner was found physically acceptable, the local board began processing him for civilian duties (II R. 9-10). Petitioner refused to cooperate with the local board in its attempt to locate suitable work for him by declining to fill out SS Form 153 which permits the registrant to indicate his preferred area of employment (II R. 10; see also 1-25, 1-26). After petitioner was granted additional time in which to search for suitable employment consonant with the national interest, the local board, on March 22, 1967, listed three jobs from which petitioner could choose his employment (II R. 11). On March 28, petitioner sent a letter to the board refusing any of the tendered positions (II R. 16). Pursuant to the provisions of 32 C.F.R. 1660.20(c), petitioner, a representative of the State Director of the Selective Service, the local board

---

[1] "R" preceded by the volume number denotes the three volume record in the court below. "1", followed by the pertinent numeral, designates a portion of the government's Exhibit One—petitioner's Selective Service file. Copies of the above have been lodged with the Clerk of this Court.

members, and the clerk of the board met, on April 21, 1967, in an attempt to reach some mutually agreeable form of employment. According to a memorandum of that meeting (See 1-11; see, also, II R. 16):

> No agreement was reached with the registrant as to a type of civilian work which he would perform in lieu of induction.
>
> Registrant stated that he would not accept any job offered, because it would "interfere with God's Law" and would be "compromising with the government". Registrant was also informed by Mrs. Powell of what could happen if he refused to accept civilian work.
>
> The local board decided that registrant should be offered employment with the Virginia Department of Highways, Ashland, Va., doing highway work.

After encountering petitioner's repeated refusals, and having concluded that suitable work was available for petitioner with the Virginia Highways Department, the local board sent petitioner's file, together with a request for authorization to order him to report to the Highway Department, to the National Director of the Selective Service (II R. 16). On May 12, 1967, the National Director determined that the job was one in the national interest (1-6). His authorization for the board's decision was received by the local board on May 18 (1-8), and on May 19, the clerk of the board sent petitioner Selective Service Form 153, signed by her (1-5), ordering him to report to the local board on June 5 for instructions on proceeding to his place of employment (II R. 18). Petitioner never appeared at the local board (II R. 22; see, also, 1-3).

ARGUMENT

1. Relying upon *Brede* v. *United States*, 396 F. 2d 155, modified upon petition for rehearing, 400 F. 2d 599 (C.A. 9), petitioner argues that his local board violated 32 C.F.R. 1660.20(d) by failing to reconvene after receiving the authorization from the National Director that the work it had determined to offer petitioner was in the national interest, and that, as a result, the board deprived him of due process of law. Since petitioner's premise that the board failed to abide by Selective Service regulations is erroneous, his due-process claim necessarily falls. The regulation relied on, 32 C.F.R. 1660.20(d), provides in pertinent part:

> If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work * * *.

The court below correctly rejected petitioner's interpretation of this paragraph, holding that "[w]hen the Director's approval was given, it was not necessary for the board to hold another meeting with respect to" ordering petitioner to report for specifically designated work (Pet. App. at 13). The only suggestion to the contrary had appeared in the original opinion in *Brede*, but, as the court below noted (Pet. App. at 10-11), the Ninth Circuit subsequently retracted that

language. On the government's petiton for rehearing, the *Brede* court stated (400 F. 2d at 599):

> The United States contends that § 1660.20(d) does not require that a meeting be held after receipt of authorization; that an order to report could be entered prior to authorization but subject to subsequent authorization and notice.
>
> We agree. In this respect our [original] opinion is modified by striking 'after receiving such authorization.'

This interpretation of the regulation, now shared by both circuits that have focused on it, is correct. Section 1660.20(d) requires only that—in those instances when the board and the registrant are unable to reach agreement on suitable employment—the authorization of the National Director of the Selective Service must be received by the local board *at some point* prior to the mailing of the notice to report for civilian employment. There is no compelling reason, either of policy or in law, why that authorization must be received prior to the board's initial, contingent determination that a certain type of employment would serve the national interest and that the registrant should be offered such employment. The discretion of the board for which a meeting is required is exercised when the board determines that certain work will be offered to the applicant, subject to the Director's approval that the work is in fact in the national interest. If that approval is obtained, a board meeting thereafter, merely to reaffirm what had originally been decided, would serve no useful purpose. And as we have seen, the board, at its meeting on April 21, performed its administrative responsibility and (1-11):

decided that registrant should be offered employment with the Virginia Department of Highways, Ashland, Va., doing highway work.

2. The order to report for civilian work was signed by the clerk of petitioner's local board. Petitioner alleges that, since the minutes of the board do not establish the adoption of a resolution authorizing the clerk to sign and issue official documents, the order of the board was void *ab initio*. The contention is without merit.[2] Irrespective of whether the local board had formally adopted a resolution authorizing the clerk to sign such notices, petitioner can point to no prejudice flowing from such a technical variation from the regulations (see 32 C.F.R. 1604.59). Undeniably, the board had completed its discretionary function; the mailing of the order communicating its decision was merely a ministerial act. As observed in *United States* v. *Hagaman*, 213 F. 2d 86, 91 (C.A. 3), petitioner "has had all the consideration due him, the courts have refused to reverse for mere technical irregularities." In this exact situation, and in similar situations, the various circuits have declined to reverse convictions because the clerk, though not expressly authorized to do so, signed and mailed various notices to registrants. The language of the regulation on which

---

[2] The same issue was recently before the Court on writ of certiorari in *Stiles* v. *United States*, No. 74, this Term. (See pp. 29-32 of the government's brief in that case.) On December 9, 1968, the Court dismissed the writ as improvidently granted.

petitioner relies has consistently been held to be directory, not mandatory. The failure to comply therewith, involving as it does a function primarily administrative in nature, does not serve to oust the board of jurisdiction over the registrant or to vitiate its orders to him. See *e.g.*, *United States* v. *Lawson*, 337 F. 2d 800, 812, 813 (C.A. 3), certiorari denied, 380 U.S. 919; *Keene* v. *United States*, 266 F. 2d 378, 380-381 (C.A. 10); *Mason* v. *United States*, 218 F. 2d 375, 377 (C.A. 9); *Talcott* v. *Reid*, 217 F. 2d 360, 364 (C.A. 9); *Kalpakoff* v. *United States*, 217 F. 2d 748, 749-750 (C.A. 9), certiorari denied, 348 U.S. 982; *United States* v. *Fratrick*, 140 F. 2d 5, 6-7 (C.A. 7).

Moreover, as noted in the opinion below (Pet. App. at 8-9), the presumption of regularity of administrative proceedings is defeated only by an affirmative showing of irregularity. Here, no such showing has been made. Pursuant to an order of the court below, the United States Attorney procured affidavits from the clerk and the members of Local Board 115, with respect to whether any resolution empowering the clerk to sign official papers had ever been adopted. The affidavit of the clerk (Pet. App. 4) indicates that such a resolution was passed at a board meeting in 1960, but that, apparently due to an administrative oversight, it was never duly entered in the minutes of the board (III R. 11). Two members of the board, Messrs. George Thorburn and John Orrock, filed affidavits in which they stated that they had "a recollection of a discussion concerning the clerk to sign all official papers and to the best of [their] knowledge this was done" (III R. 10, 12). Another member of the

board at that time, J. W. Kimman, stated in his affidavit that "there was never any question of the Executive Clerk's authority to sign any official papers * * *. The question of formally recording such authority was discussed on several occasions" with the other members of the board (III R. 13). On the basis of these affidavits, it is apparent that the board had granted to the clerk the authority to sign official papers, even though the authority was never formally recorded. In such circumstances, petitioner—who had unequivocally evidenced his intent to refuse any civilian work whatever—was in no manner prejudiced by the board's failure to comply with the literal requirements of Section 1604.59.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
J. THOMAS CARROLL, JR.,
Attorneys.

FEBRUARY 1969

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 333316 469